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A Survey of the Two Major Legal Systems in the West

西方两大法系

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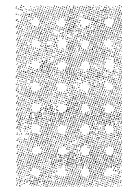
Preface



No two nations' legal systems in the west are identical, but some are sufficiently similar to allow us to think of them as belonging to a common family. Dividing the law systems of the west into different legal traditions can be done on the basis of a variety of criteria. Among those commonly used for this purpose are the historical origin and development of the system of laws, the hierarchy of the system of laws, the methods employed by legal practitioners, the characteristic legal concepts employed, the nature of the institutions involved, and the division between the different branches of the laws. If we employ these criteria to examine the legal systems of the west we can find them falling into two families: those based on the civil law and those based on the common law.

Civil law system, also called continental legal system or Romano-Germanic family. It can be found where the law is codified. Such codes set out basic laws governing every aspect of law from what constitutes criminal acts through to

the rules governing contract and the transfer of property. The term itself dates from its origin in the laws of ancient Rome.

The civil law system has a long history. It originated in continental Europe. It was formed by the efforts of the European universities which, from the 12th century and on the basis of the code of the Roman Emperor Justinian, evolved and developed a juridical science common to all and adapted to the conditions of the modern world.

As in other families, this system has many and varied laws among which there really does exist unity. This unity, however, does not exclude a certain amount of diversity. Therefore, we can recognize secondary groupings within the civil law.

The Roman legal system developed on the basis of Roman *jus civile*. Under the *jus civile* the rule of law is conceived as a rule of conduct intimately linked to ideas of justice and morality. The law has evolved as an essentially private law, as a means of regulating the private relationships between individual citizens; other branches of the law developed later, but less perfectly, according to the principles of the "civil law" which today still remains the main branch of legal science.

The task of legal science is to determine and formulate the rules of law. Legal scholars are somewhat less interested in the actual administration and practical application of the law—these matters are the responsibility of the adminis-

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tration and legal practitioners. This characteristic can be seen clearly in this course.

Different from the civil law system, the common law system came into being in England largely as the result of the activity of the royal courts of justice after the Norman Conquest. Apart from English law, this system includes all the laws of English-speaking countries with several exceptions. Apart from the English-speaking countries themselves, the influence of this system has been considerable in most, if not all, countries that have been or still are politically linked with England. These countries may certainly have retained in certain areas, their own traditions and concepts, but in all cases the English influence on the manner in which jurists think has nonetheless been great—principally because the judicial and administrative organization and the law of evidence and procedure, civil and criminal, have been established and set out along English lines. However, the common law system has been profoundly shaped by its history which varies in different countries, so some laws are very different from English law.

Although we do not here purport to be writing legal history, our discussion of the civil law system and common law system necessarily treats it as something that endures, even as particular elements of the legal systems rise, fall, and evolve. Changes and permanence in the two legal systems are some of the issues we discuss in this book.

The book is designed for students in law, philosophy

who wish to gain the understanding of this field of study. It will be useful as well for scholars since it constitutes a convenient source of materials on the two major legal systems in the west. It is also designed for the general readers who wish to understand the nature of the field and become acquainted with the development of the two legal systems.

Finally, I gratefully acknowledge the splendid help of Mr. Liu Xian Zheng in providing valuable papers and my families for their invaluable support to me. I am also very grateful to the editor Mr. Ding Chun Hui and all those who advanced suggestions for the book.

Guo Li

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Part 1 Civil Law System

Civil law is the dominant legal tradition today in most of Europe, all of Central and South America, parts of Asia and Africa, and even some discrete areas of the common-law world. Public international law and the law of the European Community are in large part the products of persons trained in the civil-law tradition. Civil law is older, more widely distributed, and in many ways more influential than the common law.

Chapter 1
Development of the Law

Law can imposed by some coercive authority, such as a king, a legislature, or a supreme court, or law can develop "from the ground" as customs and practice evolve. Law imposed from the top—authoritarian law—typically requires the support of a powerful minority; law developed from the bottom up—customary law—requires widespread acceptance. ①

① Bruce L. Benson, *The Enterprise of Law: Justice Without the State*, San Francisco: Pacific Research Institute for Public Policy, 1990, p. 12.

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1 Various Periods of the Development of the Civil Law System

1.1 The Period of Customary Law

During the reign of the Roman Empire, the Roman Genius had created a brilliant civilization and constructed a legal system without precedents. In the 5th century, the invasions of many peoples, especially Germanic tribes, led to the downfall of the Empire. Subsequent to these invasions, the Romanized peoples on the one hand and the invaders on the other continued to live side by side, according to their own laws. Along with the establishment of feudalism, territorial customs came to supplant the primitive principle of the personality of law.

There do exist some documents which can be referred to for an idea of the state of the Roman law or that of so-called barbarian laws. In the East, and to a certain extent in Italy, Roman legal theory is represented by the compilations of Justinian Code, Digest, Institutes published from 529 to 534 and compiled by a series of Novels and in France and the Spanish Peninsula, by the *lex romana visigothorum*① or *Breviary of Alanic* ② (promulgated in 506). It is certain that

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① The Lex Romana Visigothorum became from the westgothical king Alarich II. in the year 506.

② Several Latin law codes of the Germanic peoples written in the Early Middle Ages (also known as leges barbarorum "laws of the barbarians") survive, dating to between the 5th and 9th centuries. They are influenced by Roman law, ecclesiastical law, and earlier tribal customs.

the earliest written code of the Visigoths dates to Euric① (471). Code of Euric (Codex Euricianus), issued between 471 and 476, has been described as "the best legislative work of the fifth century"②. It was created to regulate the Romans and Goths living in Euric's kingdom, where Romans greatly outnumbered Goths. The code borrowed heavily from the Roman Theodosian Code (Codex Theodosianus) from the early fifth century, and its main subjects with Visigoths leaving in Southern France③. It contained about 350 clauses, organized by chapter headings; about 276 to 336 of these clauses remain today. Besides his own constitutions, Euric included in this collection the unwritten constitutions of his predecessors Theodoric I (419 – 451), Thorismund (451 – 453), and Theodoric II (453 – 466), and he arranged the whole in a logical order. Some barbarian laws, for the most part of Germanic tribes, had been drafted as of the 6th century; and for the laws of the different Slavic or Nordic tribes, the process continued until the 12th century.

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① Euric (c. 415 – 484), Son of Theodoric I and the younger brother of Theodoric II and ruled as king of the Visigoths, was one of the more learned of the great Visigothic kings and was the first German to formally codify his people's laws. The Code of Euric of 471 codified the traditional laws that had been entrusted to the memory of designated specialists who had learned each article by heart.

② P. D King, *Law and Society in the Visigothic Kingdom*, Cambridge University Press, 1972, p. 7.

③ Karen Eva Carr, *Vandals to Visigoths: Rural Settlement Patterns in Early Medieval Spain*. University of Michigan Press, 2002, p. 36.

The barbarian laws only regulated a part and often a very small part of the social relationships we now consider to be governed by law. On the other hand, the Roman compilations became too scholarly and complicated. These compilations were a scholars' law which was modified and replaced by a vulgar law① spontaneously applied in fact by the population. No one bothered to reduce these laws to writing since their sphere of application was purely local.

Later, the *Ostrogoth* chieftains of Italy② and the *Visigoth* of Spain③ tried to fuse a law applicable to their subjects of Germanic and Latin origin, but they failed. The public authorities did not attempt to reduce the existing law to a written form. They restricted themselves to intervening on certain specific points more related to public than private law and private initiative did not fill the hiatus.

The civil law system has undergone a long process of rise, fall, renaissance and prominence. The rules of law were studied and refined even when a party was successfully to depend on such means as a judgment from God, the

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① Established vocabulary, refer to AD 5, 6Century, the simplest application of the law in AD 5,6 century, using the distinction between the ancient methods, classifications missing or cross. See Ernst Levy, *West Roman Vulgar Law: The Law of Property* (*Memoirs of the American Philosophical Society*) V. 29., W. S. Hein, 2003.

② Italy sacked by Visigoths in 401.

③ Internal instability and pressing military problems caused by foreign invaders finally resulted in the sacking of Spain by a Visigoth army in 416 and made a kingdom of Spain.

oath of the parties, wager of law (compurgation①) or trial by battle and ordeal, or when it may further have turned merely upon the discretion of some local authority. What was the use of obtaining a judgment if the authorities were not obliged, or prepared, or put the force at their command to the benefit of the successful litigant?

Ordeal refers to a very severe, difficult or trying trial in the name of God to prove whether the accused is guilty or not. It prevailed in the ancient slavery countries in the Middle Ages and was abolished in Western Europe in the 12th and 13th centuries, but as a remain of the old society it existed until the second half of the 18th century. It includes a test by water, fire, battle or ferocious beast, etc.

The following is a story which explains what a trial by

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① An ancient form of trial in which an accused person could call one or more persons to swear to their belief in his innocence. Or a procedure for defending oneself that could be used in a trial before one of the ancient courts of England. A defendant who elected to "make his law" was permitted to make a statement before the tribunal, swear an oath that it was true, and present one or more individuals who swore that they believed he had told the truth under oath. This was the predominant form defense in the feudal courts, and it persisted for a time in the common-law courts. It had originated in Anglo-Saxon England in the ties of kinship that bound people together in the period before the year 1000, a time when each man was responsible for the acts of his blood relatives. Later, kinship gave way to a more tribal affiliation and a loyalty to the place of one's birth. When disputes more often than not led to violence, it seemed natural that neighbors would band together. They aligned themselves with a neighbor who was accused in court and swore that in good conscience they believed he was telling the truth. The number of oath-helpers required depended on the defendant's rank and the character of the lawsuit. Eventually it became standard practice to bring eleven neighbors into court to swear for the defendant. The oathhelpers were called compurgators, and the wager of law was called compurgation.

ordeal means.

Have you ever heard of crocodiles being used to settle a dispute? It is unusual, but I remember it happening—and not so long ago. It was in 1938 and I was then in the Colonial Service in the Solomons.

The Solomons are an island chain in the Western Pacific lying east of New Guinea and roughly parallel to it. The main islands are very large, mountainous, covered with thick rain forest, and surrounded by lagoons, reefs, and mangrove swamps; they are all of volcanic origin.

I have often blessed Mendana, the Spaniard who discovered them in 1568, for giving them such a romantic name, even if he was mistaken in thinking that they were so full of wealth that they deserved to be called the Islands of King Solomon. Their official title is much more prosaic—the British Solomon Islands Protectorate; and they have been administered without any gaps—and that includes the Pacific awr—by Her Majesty's Government since 1893. Certainly to me when I first went there in 1973 they presented a wonderful picture: remote, mysterious, beautiful, peopled by natives living on the edge of the Stone Age, and still to a great extent unknown.

My job there was to carry out the work which falls to the lot of District Officers, which meant turning my hand to anything and everything that came along. But on that particular occasion I was mainly concerned with hearing court cases of which there was a considerable backlog. One of

the joys of this kind of work was that you could thoroughly appreciate the simple pleasures, and I remember thinking as I came to the rest house one evening, how beautifully it was sited: the sun was going down and there was a wonderful contrast of color between the surf breaking on the reef outside and the quiet water of the passage.

The next morning I held court and one case concerned an assault by a man on an unmarried woman, and the woman's bride price—the amount her family would get when all its ramifications; and as these transactions play a large part in the economy of the people I was a little worried about the affairs, because the Malaita people very easily revert to the habits of their Stone Age forebears and I did not want an inter-clan battle on my hands with a number of deaths. So I heard the case quickly and made sure that the four police I had with me were alert.

There was not sufficient evidence to record a conviction, though I felt fairly sure that the man had committed the assault, and so he went free. This verdict naturally didn't please the bride's family, so to prevent trouble I put the man in protective custody and hoped that the situation could cool down. As it was, some of the woman's relatives followed my party when we went on next day, and at night I put the man between two constables while we were walking to prevent an ambush; and when we stopped he slept in the police room. But by the time I had finished my work on the island the woman's relatives had gone home, hunger being a

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